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November 17, 2003

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Washington, D.C. 20554

John Muleta
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Rc: In the Matter of Telephone Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; CG Docket No. 95-116; In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Report and Order; CG Docket No. 02-278

Dear Messrs. Snowden and Muleta:

I write on behalf of The Direct Marketing Association, Inc. ("DMA") and its members to raise an issue that was not addressed in the Commission's Memorandum Opinion and Order ("LNP Order") released earlier this week on telephone number portability.¹ The LNP Order does not address the implications of wireline-to-wireless number porting for telemarketing calls subject to the Telephone Consumer Protection Act of 1991 ("TCPA"). For the reasons stated below, we request that the Commission declare that that autodialer calls that terminate to a wireless number as a result of intermodal porting are not actionable until further notice.

As you know, the TCPA generally prohibits the use of an autodialer to place telephone solicitation to a wireless number or similar services numbers for which the called party is charged for the call. In effect, since the vast majority of telemarketing calls are placed using automated dialing technology, this means that the TCPA prohibits most telemarketing calls to

¹ See Telephone Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket 95-116 (Released Nov. 10, 2003)("LNP Order").

wireless phones.² The FCC stated in its Report and Order amending the TCPA rules, (“TCPA Order”) that porting will not “make it impossible for telemarketers to comply with the TCPA” noting that “information is available from a variety of sources to assist telemarketers in determining which numbers are assigned to wireless carriers.”³ The Commission acknowledged that “numbers previously used for wireline service could be ported to wireless service providers,” but that there are “various solutions that will enable telemarketers to identify wireless numbers.”⁴ The Commission thus declined “to mandate a specific solution, but rather rely on the telemarketing industry to select a solution that best fits telemarketers’ needs.”⁵

To implement the kind of solution the Commission envisioned, DMA promptly and diligently contacted Neustar to obtain access to critical data required to determine that a wireline number has been ported to wireless service, to enable suppression of calls to such numbers. To date, Neustar – which will be the sole, centralized source of such data – has ignored our repeated requests, effectively refusing to cooperate. Without this information, it will be impossible for telemarketers to timely and reliably identify and suppress calls to wireless numbers ported from wireline number service.

The November 24, 2003 LNP deadline is fast-approaching. Although I stress that DMA’s current Wireless Suppression Service list will continue to function as it does currently for new numbers that are issued to wireless carriers, that will not eliminate the problem that arises with intermodal porting. The FCC noted in its Report and Order that “telemarketing to wireless phones is not a significant problem,”⁶ But it will become a very real problem if marketers are unable to identify numbers that are newly-ported from wireline to wireless service. In short, our members will not know – and will have no way of knowing – that they should not place autodialed calls to such numbers. This is a serious concern for DMA and its members as millions of wireline customers are expected to port to wireless.

In fact, the Commission itself recently estimated that six million customers may try to port to wireless within the first week alone.⁷ Sprint noted a recent survey found that more than 16 percent of LEC residential customers would definitely or probably port their number to wireless service.⁸ A wireless industry representative also said recently that the greatest volume of ports in the first couple of months could be intermodal.⁹ Thus, absent prompt Commission action, DMA members may be exposed not only to risk of Commission enforcement, but also to suits by state officials and thousands, if not millions, of private lawsuits authorized under the TCPA despite the fact that they are unable as a technical matter to comply fully at this time.

² See 47 U.S.C. § 227(b)(1) (2003); see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CC Docket 02-278 ¶ 165 (Released July 3, 2003) (“TCPA Order”).

³ See TCPA Order at ¶ 170.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at ¶ 171.

⁷ See Press Release, FCC Issues Guidance on Implementation of Wireless-to-Wireless Local Number Portability (Oct. 7, 2003).

⁸ See Letter from Luisa L. Lancetti, Vice President, PCS Regulatory Affairs, Sprint Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116 (Sept. 24, 2003).

⁹ See Mary Greczyn, FCC Seeks Seamless Consumer Process for Wireless LNP, *Comm. Daily*, Sept. 12, 2003.

It is not clear to us when the TCPA problem will arise, but it assuredly will. For these reasons we are requesting that the Commission declare that the violations of the TCPA that will undoubtedly occur as a result of wireline-to-wireless porting are not actionable until further notice. I would welcome an opportunity to meet with you and your staff to discuss this issue further and explore options for resolving it.

Sincerely,



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